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Volume 2 | Issue 4

Article 4

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1957

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### Recommended Citation

Samuel Polsky, *Present Insanity - From the Common Law to the Mental Health Act and Back*, 2 Vill. L. Rev. 504 (1957).

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PRESENT INSANITY—FROM THE COMMON LAW TO  
THE MENTAL HEALTH ACT AND BACK.

SAMUEL POLSKY †

*Introduction.*

FROM Bracton<sup>1</sup> in the thirteenth century to *Durham*<sup>2</sup> in the middle of the twentieth century, the primary emphasis or focus of attention, has been upon the exculpatory plea of insanity. With the emergence of the M'Naghten Rules<sup>3</sup> a little more than a century ago, this dominant tendency was, if anything, intensified. This concentration of emphasis is natural enough not to require any special justification. Those definitions of mental abnormality which are directly related to the fundamental issue of responsibility, or lack of responsibility, in criminal cases must inevitably demand priority of attention. The result has been that the supplementary concepts that we term "present insanity" have received much less attention.

There are other reasons, of course, why "present insanity" has not commanded the attention of writers or judges to the same degree as the exculpatory tests of insanity. In the first place, the common-law test of "present insanity" required that the accused be unable to understand the nature of the proceedings, or to communicate with counsel sufficiently to be able to prepare his defense. When the plea was raised after trial, reasons had to be advanced why sentence should not be

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1. BRACTON, *DE LEGIBUS* lib. 3, f. 100, lib. 5, f. 420b. The two principal observations made in *De Legibus* have been combined by subsequent generations of legal writers into the form, "*Furiosus non intelligit quod agit, et animo et ratione caret, et non multum distat a brutis*" or, "An insane person is one who does not know what he is doing, and is lacking in mind and reason, and is not far removed from the brutes." The concepts involved, however, owe their origin to Bracton's thinking and writing of the thirteenth century.

2. *Durham v. United States*, 214 F.2d 862, 874-875 (D.C. Cir. 1954). "[Stated] . . . simply [the rule is] that the accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." This recent and provocative "test" for criminal responsibility had a nineteenth-century germination in New Hampshire in *State v. Pike*, 49 N.H. 399 (1869), and a twentieth-century budding in the striking dissent by Chief Judge Biggs speaking for the minority of the court in *United States ex rel. Smith v. Baldi*, 192 F.2d 541, 549 (3d Cir. 1951).

3. M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843) precipitated the questions and answers known as the M'Naghten Rules. In their historical setting they are to be found in 1 TOWNSEND, *MODERN STATE TRIALS* 314 (1850).

imposed or executed. All this, of course, was a far stricter standard than even the M'Naghten Rules imposed. In the second place, "present insanity" had received and still receives comparatively little treatment in the appellate courts by way of definition or determination of the limit of its application. The exculpatory plea of insanity, on the other hand, has had little short of a barrage of judicial opinion and interpretation directed at it.<sup>4</sup> As a consequence, relatively few defense counsel in the United States have risked raising the plea of "present insanity," while many have raised the exculpatory plea in defense of a criminal charge.

Despite all this, "present insanity" is a highly important concept. Moreover, it is a concept of increasing significance in the law today. It is in keeping with the modern spirit of obtaining as much information in advance of trial as possible<sup>5</sup> (exemplified most strongly perhaps in modern discovery rules). It emphasizes a growing tendency to attempt to deal with the problem of mental abnormality at a pre-trial stage.<sup>6</sup> Mental health acts in various states, including Pennsylvania, further indicate the beginnings of a modern trend. More striking still is the recent testimony taken by the Royal Commission on Capital Punishment. Scotland, with a common-law concept quite different from that of the English standard of "present insanity," has been able to dispose of the great bulk of cases that would otherwise involve an exculpatory plea at trial, by a pre-trial plea in bar of trial.<sup>7</sup> This is especially significant in view of the fact that the Scottish plea in bar of trial is in many respects similar to ordinary commitment concepts of our mental health acts in this country.

At the root of all this lies the simple distinction between "present insanity" and the exculpatory plea of insanity. The former is concerned with state of mind at the time the psychiatrist does his examination and

4. BIGGS, *THE GUILTY MIND*, (1955) traces the historical development in detail.

5. Professor Wechsler in discussing section 4.05 of the Model Penal Code's provisions for psychiatric examination including hospital commitment has characterized them as "the heart of this matter." ALI PROCEEDINGS 225 (1955).

Professor Weihofen has summed up by saying, "It may be that in actual operation, these provisions for impartial expert examination of the defendant will be the most significant part of the Model Code's provisions governing mental irresponsibility." Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 TEMP. L.Q. 235, 238 (1956).

6. The Briggs Law of Massachusetts is possibly the most famous of these attempts. MASS. ANN. LAWS c. 123, § 100 A (1953).

7. Lord Cooper, The Lord Justice General of Scotland, testified before the Royal Commission on Capital Punishment that the "normal case . . . is that insanity is pleaded to stop the trial," and that he could not "recall having ever conducted a trial where insanity was pleaded to avoid conviction." *Minutes of Evidence of the Royal Commission on Capital Punishment* 437 (April 4, 1950).

The statistics of the Scottish home department indicated that during the period 1900 to 1948, inclusively, 104 persons were found unfit to plead while only 23 were found insane at the time of the act. *Id.* at 65, app. II, Table I (Aug. 5, 1949).

at the time the court considers the matter. It is obviously easier to answer the question, "What is this man's state of mind at the present time?" than it is to answer that same question with respect to a time past, perhaps long past. In addition, the results of an examination limited to the present are obviously more reliable than conclusions dealing with a period months, or possibly even years past.

# I.

## THE ENGLISH COMMON-LAW CONCEPT OF PRESENT INSANITY.

The English common law recognized present insanity as a plea in bar of trial, sentence, or execution.<sup>8</sup> The result was that criminal proceedings could be stayed before trial, at trial, or even after trial. The plea in bar of trial could be raised at any point up to and including trial. In theory this meant that even at indictment the plea was open to the accused,<sup>9</sup> but in actuality it was limited by the practical necessity of obtaining a judicial ear to hear the plea. Hence the actual practice was to raise the plea either on arraignment or, as was more often the case, at the inception of the trial itself. The post-trial pleas in bar of sentence or in bar of execution of sentence were utilized essentially in cases of supervening madness, after an exculpatory plea of insanity had failed.

Blackstone gave the common-law rationale of the present insanity pleas in concise form when he pointed out that,

" . . . if a man in his sound memory commits a capital offense and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of non sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." <sup>10</sup>

8. In *Commonwealth v. Ragone*, 317 Pa. 113, 176 Atl. 454 (1934), the Pennsylvania Supreme Court, in support of the Pennsylvania common-law position, quoted from 4 BLACKSTONE, COMMENTARIES \*296 as follows: "Though a man be compos when he commits a capital crime, yet if he become non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction he shall not receive judgment; if after judgment, he shall not be ordered for execution; for . . . the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings."

9. " . . . if he becomes non compos after, he shall not be indicted . . . " *Ibid.*

10. 4 BLACKSTONE COMMENTARIES \*24, 25. See also the language quoted in note 8 *supra*.

While Blackstone was speaking of supervening present insanity in all the instances cited, the plea in bar of trial at common law was somewhat broader. For if the condition that prevailed at the time of the criminal act not only persisted unaltered, but was such that the accused was rendered unfit to defend his case, he was not required to do so. The humanitarian ring of Blackstone's language is, however, misleading. It was not humanitarianism, but simply a need to fill a gap in the law that led to the concept of present insanity. Supervening madness could not be taken into account in the exculpatory plea, hence the present insanity concept arose. Once viable, it led by natural extension to the general plea in bar of trial based on present insanity irrespective of state of mind at the time of the criminal act.

A larger question remains. What was the common-law test of present insanity? Blackstone's language does not set out a test; it summarizes a rationale in terms of its origins in the law.

Three situations faced the common law. The first was that of insanity at the time of the act, which continued to time of trial. As a practical matter, this situation could be disposed of by an exculpatory plea.

The second situation was that of supervening insanity which required a different procedural device, and received it through development of a present insanity concept.

The third situation was that of present sanity coupled with temporary insanity at the time of the act. Our modern tendency to wholly discount temporary insanity must not cause us to overlook the real existence of the temporary insanity concept at common law.

Coke analyzed *non compos mentis* into four categories, the third of which was,

"A lunatique that hath sometime his understanding and sometime not, aliquando gaudet lucidis intervalis, and therefore here is called non compos mentis, so long as he hath not understanding."<sup>11</sup>

Although the civil law rather than the criminal law was Coke's point of departure, the analysis he proposed seemed to be a general one, and clearly recognized temporary insanity.

Hale utilized a three part classification with subdivisions. In his second category (*dementia accidentalis vel adventitia*) he separated mental disease into two types, "total" and "partial";<sup>12</sup> the latter he

11. CO. LITT. lib. 3, c. 6, § 405 (13th ed. 1812).

12. 1 HALE, PLEAS OF THE CROWN, 29-37 (1847).

further subdivided into (a) partial with respect to subject matter,<sup>13</sup> and (b) partial with respect to degree. He also distinguished between permanent madness<sup>14</sup> and "that which is interpolated, and by certain periods and vicissitudes," a temporary condition that he called "lunacy."<sup>15</sup>

Both Coke and Hale were writing about the exculpatory standard. But the seventeenth and eighteenth centuries were the great periods of legal analysis in the common-law development of concepts of mental abnormality.<sup>16</sup> The change from Coke and Hale with their concept of "total madness" and "total deprivation of sense"<sup>17</sup> to Hawkins with his concept of capability of "distinguishing good from evil"<sup>18</sup> was monumental insofar as the defense of exculpatory insanity was concerned. It did not, however, change the concept of present insanity, for the English legal analysts were concerned with exculpation from criminal responsibility. The older idea of total deprivation of reason as the criterion of mental abnormality in its forensic applications continued to operate as the standard for present insanity.

The recognition of temporary insanity ("lunacy") by Coke and Hale did, of necessity, carry over into present insanity,<sup>19</sup> since it led to

13. Although Hale was clear and explicit as to his meaning, later writers mis-cited Hale as authority for the now discredited theory of "monomania." Hale spoke of those who "... have a competent use of reason in respect of some ... particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offense for its matter capital." *Id.* at 30.

14. Permanent madness did not mean "total madness," since Hale equated the latter term with Coke's "total deprivation of sense."

15. Hale described the condition as follows: "... for the moon hath a great influence in all diseases of the brain, especially in this kind of dementia; such persons commonly in the full and change of the moon, especially about the equinoxes and summer solstice, are usually in the height of their distemper; and therefore crimes committed by them in such their distempers are under the same judgment as those whereof we have before spoken, namely, according to the measure or degree of their distemper; the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty as if he were mad without intermission. But such persons as have their lucid intervals (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment as if they had no such deficiency . . . ." 1 HALE, *PLEAS OF THE CROWN* 30 (1847).

16. In addition to the great seventeenth century works of Coke and Hale, there was the influential writing of Hawkins who, in the late seventeenth and early eighteenth centuries, contributed the first analytical formulation of the "knowledge test" for criminal responsibility, in language resembling M'Naghten terminology. Blackstone was still another giant of the eighteenth century.

17. See note 14 *supra*.

18. "... those who are under a natural disability of distinguishing between good and evil as infants under the age of discretion, idiots and lunatics, are not punishable by any criminal prosecution whatsoever."

19. It also carried over into the term "lunacy commission." In Pennsylvania (and elsewhere) lunacy commissions were the assessors of present state of mind under the older practice.

recognition of the fact that a man might have been mad at the time of the criminal act, while sane at the time of trial. It also gave analytical meaning to the situation of supervening insanity, present at time of trial although absent at the time of the act. In practical consequence, the test for present insanity continued to be the old concept of "total madness."

The phrase "*furiosus solo furore punitur*," a lunatic is punished by his madness alone, had originally been applied by the legal analysts as a rationale for exculpation.<sup>20</sup> Generally it seeped into the language of the courts where it was added to the rationale of present insanity, particularly with respect to insanity in bar of sentence or execution of sentence.<sup>21</sup> But for madness to be its own punishment at common law it had to be total madness, and nothing less was meant. He who was already the prisoner of his own mind, locked off from the world not by bars, but by the equally effective barrier of mental abnormality, was immune from further punishment. Only total madness fitted this frame of reference. Madness<sup>22</sup> was indeed a complete punishment in itself, but only total deprivation of the senses<sup>23</sup> rendered it complete.

Early English case law was not abundant, and its *ad hoc* approach was not particularly fruitful in conclusions amplifying the thought of

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20. Thus Coke reasoned as follows: "for in criminal causes, as felonie, &c., the act and wrong of a madman shall not be imputed to him, for that in those causes *actus non facit reum, nisi mens sit rea* (the act does not make the criminal unless the mind, or intention is criminal); and he is *amens* (*id est*) *sine mente*,—without his minde or discretion; and *furiosus solo furore punitur*,—a madman is only punished by his madness."

Blackstone set out the general "rule of law as to the . . . (idiot), which may easily be adapted also to the (lunatic) . . . that '*furiosus furore solum punitur*'. In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts if committed when under these incapacities: no, not even for treason itself."

21. In *Commonwealth v. Ragone*, 317 Pa. 113, 125, 176 Atl. 454, 459 (1934) the Pennsylvania Supreme Court uses the following quotation approvingly: "The true reason why an insane person should not be tried, is, that he is disabled by an act of God to make a just defense if he have one. As is said in 4 Harg. Stat Trials 205, 'there may be circumstances lying in his private knowledge, which would prove his innocence, of which he can have no advantage, because not known to the persons who shall take upon them his defense.' . . . A madman cannot make a rational defense, and as to punishment, *furiosus solo furore punitur*." (citing cases)

22. Partial madness was not a defense. See note 13 *supra*. The emerging "knowledge test" was applicable only to exculpatory plea of insanity as a defense to criminal responsibility. See notes 16 and 18 *supra*.

23. It must be remembered that we are concerned here with common-law concepts, and must use common-law language even when it irritates the ear accustomed to the language of twentieth century psychiatry. As Zilboorg and Henry point out, medicine had yielded the study of the mind to the layman, by default, at that time: ". . . the seventeenth century, and for that matter the greater part of the eighteenth, present a striking paradox: the scientist and the physician, so seriously concerned with nature and man, gave up their pre-occupation with the human mind and left it partly to the theologian who had always claimed it as his own domain and partly to the enlightened layman-philosopher who began to appear in increasing number." ZILBOORG AND HENRY, *A HISTORY OF MEDICAL PSYCHOLOGY* 247 (1941).

And as Roche has so well established, the problem of communication between law and psychiatry, and within each discipline, has not been solved even today. Roche, *Durham and the Problem of Communication*, 29 TEMP. L.Q. 264 (1956).

the English analysts. *Beverley's case*<sup>24</sup> in 1603 looked to Bracton for authority and guidance and yielded an exculpatory standard of total madness expressed in the "wild beast" analogy.<sup>25</sup> *Arnold's case*<sup>26</sup> in 1724 has often been cited as the initial authority for the so-called "wild beast" test.<sup>27</sup> Although Bracton undoubtedly has priority of authorship<sup>28</sup> it is clear that Judge Tracy, five centuries later, employed an exculpatory standard that was much the same.<sup>29</sup> In *Earl Ferrers' case*<sup>30</sup> in 1760, the Solicitor-General drew upon both Hale and Hawkins, and noted that total want of reason would acquit.<sup>31</sup> Far from disturbing the conclusions of the legal analysts of the seventeenth and eighteenth century, the cases of the same period leaned heavily upon them for support.

## II.

### THE EARLY PENNSYLVANIA CONCEPT OF PRESENT INSANITY.

The Pennsylvania cases do not reflect the understanding of the English common-law concept of present insanity that has been outlined above. The tendency in Pennsylvania has been to quote the English rationale, without coming to grips with the English standard. Some late instances of this tendency have already been noted.<sup>32</sup>

## A.

### Plea in Bar of Trial.

Whatever the English common-law test may have been, the Pennsylvania concept soon became a matter of law expressed in terms that

24. 4 Co. Rep. 123b, 76 Eng. Rep. 1118 (K.B. 1603).

25. Coke reported *Beverley's case* as a civil matter relating to the effect of a bond, executed while *non compos mentis*, and the doctrine of non-stultification. But with respect to the criminal law, Coke observed: "No felony or murder can be committed without a felonious intent and purpose; *et ideo dicta est feloniam, quia fieri debet felleo animo*: but *furiosus non intelligit quid agit, et animo et ratione caret, non multum distat a brutis*, as Bracton saith and therefore he cannot have a felonious intent." *Id* at 124b, 76 Eng. Rep. at 1121.

26. 16 How. St. Tr. 695 (C.P. 1724).

27. See for example 1 WHARTON AND STILLE, MEDICAL JURISPRUDENCE 524 (5th ed. 1905).

28. See note 1 *supra*.

29. Judge Tracy said: "... it is not every frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment; it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment . . ." *Rex v. Arnold*, 16 How. St. Tr. 695, 766 (C.P. 1724).

30. 19 How. St. Tr. 886 (H.L. 1760).

31. The Solicitor-General also utilized an incipient form of the knowledge test, saying that partial reason, "... sufficient to have restrained those passions which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then upon the fact of the offense proved, the judgment of the law must take place." *Id* at 947.

32. See notes 8 and 21 *supra*, for instances (in the *Ragone* case) as late as 1934.



made the English rationale the Pennsylvania test or standard. The Act of March 31, 1860, concerned itself with procedure but made no distinction with respect to differences in plea at various stages of trial, and simply grouped together insanity on arraignment and at trial.<sup>33</sup> It gave the court specific power to order kept in custody and ultimately committed to a mental institution,

“ . . . any person indicted for an offence [who] shall, upon arraignment, be found to be a lunatic, by a jury lawfully impanelled for the purpose, or if, upon trial of any person so indicted, such person shall appear to the jury charged with such indictment to be a lunatic. . . . ”

The use of the term “lunatic” brought the statute squarely within the concepts and terminology of the English common law.

The Pennsylvania Supreme Court's expression of the English concept was restricted to the language of the English rationale, as the cases subsequently indicated.<sup>34</sup> But the court did something more. It broadened and liberalized the English concept when in 1869 it said that in order to find a person to be a lunatic it was not necessary that his mind should be entirely blotted out.<sup>35</sup>

Unfortunately, the liberalization was soon submerged by the court's increasing reliance on the English language of rationale as a definition of the standard to be employed. Implicit in the *Webber* case,<sup>36</sup> for example, was the conclusion that if the accused showed “reasoning power”<sup>37</sup> he was fit for trial. Counsel for the defense had requested a preliminary trial to determine present insanity. This was refused by the trial court.<sup>38</sup>

33. PA. STAT. ANN. tit. 19, § 1352 (1930).

34. See *Commonwealth v. Simancowicz*, 242 Pa. 402, 89 Atl. 562 (1913); *Webber v. Commonwealth*, 119 Pa. 223, 13 Atl. 427 (1888).

35. *Commonwealth v. Schneider*, 59 Pa. 328 (1868).

36. *Webber v. Commonwealth*, 119 Pa. 223, 13 Atl. 427 (1888).

37. The trial court came to the following conclusion, which the Pennsylvania Supreme Court upheld, with respect to present insanity: “. . . I came to the conclusion that the prisoner knew where he was, what he was here for, and what was being done.” *Id.* at 253, 13 Atl. at 440 (dissenting opinion). These factors were sufficient, it was determined, to “show reasoning power.”

In addition, the trial court noted, in an opinion which the dissenting Justice quoted at length, that the prisoner on being asked to plead at arraignment said, “I don't think it necessary for me to do so, I do not consider myself guilty of anything at all,” and also noted that these were not the words of a madman or lunatic. *Id.* at 252, 13 Atl. at 439 (dissenting opinion).

See also note 112 *infra*.

38. The jury, however, was instructed not only to consider the exculpatory defense but also the question of present insanity as an additional finding to their verdict. *Id.* at 239-240, 13 Atl. at 432.

The Act of 1860 was not repealed by subsequent legislation,<sup>39</sup> and in consequence, may still be used as an alternative to the Mental Health Act of 1951,<sup>40</sup> although the recent applications of the latter act lead one to wonder whether there is likely to be any difference in result<sup>41</sup> despite the vast differences in the statutory language. Other legislation<sup>42</sup> has been reduced to historic interest through repeal.

During the period between the Act of 1860 and the Mental Health Act of 1923,<sup>43</sup> the pattern was relatively undisturbed. There was reaffirmation, in principle, of the English common-law view that a criminal defendant presently insane at the time of arraignment could not be tried even though he was sane at the time of the act for which he had been indicted.<sup>44</sup> Similarly, the principle of the plea in bar of trial in its broader aspects beyond arraignment was, in principle, reaffirmed,<sup>45</sup> as indeed it has continued to be reaffirmed in Pennsylvania as a common-law concept.<sup>46</sup>

In the *Simanowicz* case<sup>47</sup> in 1913, the Supreme Court indicated that the governing concept remained, ". . . whether he is mentally able to make a rational defense. . . ." A verdict of guilty of first degree murder was reversed because in a preliminary hearing the trial court had incorrectly charged the jury with respect to the standard to be employed.<sup>48</sup>

39. Judge Laub notes that "As things now stand a defendant may make his plea of insanity concurrently with his trial on the merits [citing the Act of 1860, as amended, PA. STAT. ANN. tit. 19, § 1351 (1930)], or he may plead insanity upon arraignment [citing Act of 1860 § 67, PA. STAT. ANN. tit. 19, § 1352 (1930)]." Laub, *Insanity As a Defense to Homicide in Pennsylvania*, 20 TEMP. L.Q. 345, 352 (1947).

The Mental Health Act of 1951, Pa. Stat. Ann. tit. 50, §§ 1071-1622 (1954) does not repeal the Act of 1860; hence Judge Laub's statement still holds true.

40. PA. STAT. ANN. tit. 50, §§ 1071-1622 (1954).

41. See, for example, the second *Moon* case, *Commonwealth v. Moon*, 386 Pa. 205, 125 A.2d 594 (1956).

42. The Act of May 14, 1874, P.L. 97 (which grouped together insanity at arraignment and in bar of trial, sentence and execution of sentence) was repealed by the Mental Health Act of 1923, Pa. Sess. Laws 1923, No. 414, which with its amendments, was in turn revised by the Mental Health Act of 1951, PA. STAT. ANN. tit. 50, § 1071-1622 (1954).

43. Pa. Sess. Laws 1923, No. 414.

44. *Commonwealth v. Endrukut*, 231 Pa. 529, 80 Atl. 1049 (1911).

45. *Commonwealth v. Tompkins*, 265 Pa. 97, 108 Atl. 350 (1919).

46. *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955); *Commonwealth v. Ragone*, 317 Pa. 113, 176 Atl. 454 (1935); *Commonwealth v. Scovern*, 292 Pa. 26, 140 Atl. 611 (1928).

47. *Commonwealth v. Simanowicz*, 242 Pa. 402, 89 Atl. 562 (1913).

48. The charge was as follows: "Now he has had hallucinations; he has had delusions; and the doctors say to us that they are of a fixed and of a permanent character; that is, he cannot dissuade himself of those false impressions, whether they were derived externally from the intuition of the senses or were received in that way from the generation of his own impression, so he cannot get rid of them. If you believe that . . . and if you are satisfied beyond a reasonable doubt, then you ought to say that this man is insane." *Id.* at 403, 89 Atl. at 563.

The Mental Health Act of 1923, as amended,<sup>49</sup> provided as follows in section 308:

"When any person detained in any prison, penitentiary, reformatory or other penal or correctional institution, whether awaiting trial or undergoing sentence, . . . shall . . . be insane, or in such condition as to make it necessary that he be cared for in a hospital for mental diseases, the said superintendent [etc.] shall immediately make application. . . ."

This seemed to pose alternative standards for the plea in bar of trial: (a) present insanitary as it had hitherto been developed substantively in Pennsylvania, or (b) a new concept analogous to civil commitment, *i.e.*, need for care in a mental hospital. When speaking of the consequences of an affirmative finding, however, the legislature either deliberately or in consequence of inadvertent draftsmanship, referred only to "insanity."<sup>50</sup>

In the *Green* case,<sup>51</sup> it became apparent beyond all doubt that the alternative introduced by the legislature was to be given no effect. For in 1943 the court was utilizing the same factors<sup>52</sup> in the same manner as it had in 1888 in the *Webber* case.<sup>53</sup> The standard employed was still the old English rationale in its Pennsylvania guise as a test of mental capacity sufficient for defendant to be ". . . fully capable of defending himself. . . ."

This should not have proved surprising in light of the entrenchment of the old concept that had occurred following the Mental Health Act of 1923. The lower courts, with Supreme Court approval, had consistently applied the old common-law doctrine in its seventeenth- and eighteenth-century form, although they continued to write opinions in terms of the English rationale rather than the old English standard. Abnormal conduct viewed from this frame of reference, as in

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49. By the Act of May 28, 1937.

50. Section 308 stated: "If the person found to be insane and removed to a hospital is awaiting indictment or trial, or has been arraigned or is being tried, proceedings against him shall be stayed until his recovery. . . . If he is a convict serving sentence, the time during which he is in the hospital shall be computed as part of the term for which he was sentenced." Act of July 11, 1923, P.L. 414, § 308.

51. *Commonwealth v. Green*, 346 Pa. 172, 29 A.2d 491 (1943).

52. The trial court's rejection of the plea of present insanity was sustained on the following reasoning: "In refusing his motions, the learned trial court, having referred to the report of Dr. Baldi, said that at the trial appellant showed intelligence and understanding. He paid attention to what was going on, and consulted and advised with his counsel during the examination of the jurors on their voir dire and of the witnesses who testified against him. His demeanor was that of a normal man, and in no way did he show lack of comprehension of the nature of the proceedings or that he was insane." *Id.* at 174, 29 A.2d at 492.

53. *Webber v. Commonwealth*, 119 Pa. 223, 13 Atl. 427 (1888). Compare notes 37 and 52 *supra* with one another and with note 114 *infra*.

*Commonwealth v. Barnes*,<sup>54</sup> could readily be ascribed to a combination of possible malingering, low mentality, poor health and eccentricity.<sup>55</sup> There were, of course, situations where even a liberal test such as the legislature seemed to have preferred as a new alternative under the 1923 Act might have reached the same result. *Commonwealth v. Scovern*<sup>56</sup> might serve as an example.<sup>57</sup> Even serious mental illness, on the other hand, could not penetrate the absolutism of the standard that continued to be applied in practice. In *Commonwealth v. Cilione*<sup>58</sup> the Supreme Court, citing *Scovern*, said, "Of course, a person who by reason of insanity is unable to comprehend his position and to make a rational defense cannot be tried on a criminal charge while in that condition." In application, however, a defendant who had previously been hospitalized for dementia praecox gained little or nothing with respect to present insanity; certainly under the Court's holding, he gained no presumption of continuing insanity after hospital discharge.<sup>59</sup>

## B.

### Plea In Bar of Sentence.

An identical process took place with respect to insanity in bar of sentence in that the seeming humanitarianism of the English rationale was voiced as the Pennsylvania standard, while in practice the rigors of the old English standard were applied,<sup>60</sup> and continued to be applied.<sup>61</sup>

54. 280 Pa. 351, 124 Atl. 636 (1924).

55. The opinion states: "... the court below, through the trial judge, who saw the appellant and heard him testify, states; 'We are not convinced [he is] not malingering ... that the prisoner is of low mentality may be conceded; that his bodily health is not of the best may be admitted; that he is and has been a peculiar and eccentric man is not to be denied; but that he is sane at this time we have no doubt.'" *Id.* at 353, 124 Atl. at 137.

56. 292 Pa. 26, 140 Atl. 611 (1927).

57. The opinion notes: "The trial judge is not compelled to grant an inquest in all cases, nor did he abuse his discretion in refusing the petition for the appointment of a commission in this case. He observed the prisoner in the courtroom, made an investigation of his mental state, received reports from the jail warden and an alienist, and those having defendant in charge, and found, as stated in the opinion overruling motion for the new trial, the 'conduct of the defendant ... shows nothing more than that he was of mean disposition and ever sought to impose his will upon those with whom he came in contact.' We have carefully read the evidence and approve the finding." *Id.* at 33, 140 Atl. at 613.

58. 293 Pa. 208, 142 Atl. 216 (1928).

59. Similarly, there has been denial of any presumption of prior insanity where there was transfer to a mental hospital during imprisonment under sentence. *Commonwealth ex rel. Hudson v. Burke*, 175 Pa. Super. 241, 103 A.2d 279 (1954), *cert. denied*, 348 U.S. 844 (1954).

60. *Commonwealth v. Schmous*, 162 Pa. 326, 29 Atl. 644 (1894); *Laros v. Commonwealth*, 84 Pa. 200 (1877).

61. *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955). See *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 71 A.2d 107 (1950), *cert. denied*, 340 U.S. 812 (1950).

*Commonwealth v. Hays*<sup>62</sup> left some doubt with respect to conditions other than supervening insanity after trial. At least one writer of stature characterized the *Hays* case as an indication that only supervening insanity would qualify in bar of sentence.<sup>63</sup> A more conservative appraisal indicates that the court had no way of knowing from the record in that case whether present insanity had been determined or considered by the jury at trial. Theoretically, therefore, *Hays* did not limit the plea in bar of sentence to supervening insanity after trial. As a practical matter, however, *Hays*, considered in light of the rather rigid Pennsylvania standard of present insanity, might well be regarded<sup>64</sup> as having had the effect that present insanity raised at trial would bar raising the plea after trial, except on grounds of supervening insanity.

The Act of 1860 was not concerned with the post-trial pleas, and the Mental Health Act of 1923 did not specifically<sup>65</sup> refer to this phase of proceedings. The Act of May 2, 1933,<sup>66</sup> remedied the omission,<sup>67</sup> and created a new standard,<sup>68</sup> or test, for the plea in bar of sentence. This standard will be considered in comparison with the standard set under the 1951 Mental Health Act.

### C.

#### Plea in Bar of Execution of Sentence.

Despite the authority that can be found for an English common-law recognition of insanity in bar of execution of sentence,<sup>69</sup> the early

62. 195 Pa. 270, 45 Atl. 728 (1900).

63. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 432 (1954), treated *Hays* as holding, "that the fact that the defendant is insane is not sufficient; it must further appear . . . that he has become insane since the verdict, in order to require the passing of sentence to be suspended."

64. Unfortunately, subsequent cases citing the *Hays* case did not clear up the matter. See *Commonwealth v. Patskin*, 375 Pa. 368, 100 A.2d 472 (1953); *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 71 A.2d 107 (1950); *Commonwealth v. Barnes*, 280 Pa. 351, 124 Atl. 636 (1924).

65. Section 308 of the act simply said it applied to a person, "awaiting trial or undergoing sentence" and to a person "awaiting indictment or trial or [who] has been arraigned or is being tried. . . ." Pa. Sess. Laws 1923, No. 414.

66. Pa. Sess. Laws 1933, No. 78, which ceased to be operative when the Mental Health Act of 1951 went into effect.

67. By providing as follows: ". . . in case of a conviction of any person for any offense, the trial judge may, on his own initiative, or on . . . application . . . defer sentence until the report of a mental examination of the defendant can be secured to guide the jury in determining what disposition shall be made of the defendant," Act of May 2, 1933, P.L. 78, § 1.

68. By providing as follows: "If the report of the examination by the psychiatrist shows that the defendant, though not insane is so mentally ill or mentally deficient as to make it advisable for the welfare of the defendant or the protection of the community that he or she be committed to some institution other than the county prison, workhouse, or a penitentiary, the trial judge shall have power by virtue of this act to commit such defendant to any state or county institution provided for the reception, care, treatment and maintenance of such cases or similar mental cases . . . ." *Id.* § 3.

69. See notes 8 and 10 *supra*.

Pennsylvania cases<sup>70</sup> took the view that a stay of execution of the death sentence was solely a matter of executive clemency. But even at common law the matter was not one of drawing lines of demarcation between the royal prerogative of mercy and legal rights. There was inherent power in the courts to exercise judicial discretion in granting or denying a plea in bar of execution of sentence, however infrequently they may have done so.<sup>71</sup>

In 1950, *Commonwealth v. Ashe* necessitated consideration of section 308 of the 1923 Mental Health Act, as amended by the Act of May 2, 1933. The court held that the act "applies to a person who is in prison awaiting execution of a death sentence as well as to other persons," and clearly recognized its own common-law power to prevent the execution of one presently insane.<sup>72</sup>

A year later the Mental Health Act of 1951 replaced the Act of 1923 but the common-law power, acknowledged in *Ashe*, persisted as an adjunct to the new statute just as it had with respect to the old.

### III.

#### MENTAL HEALTH ACT OF 1951.

The present Mental Health Act was enacted in 1951, and amended in 1952;<sup>73</sup> it replaced<sup>74</sup> the 1923 Act similarly named.

The act provides for four categories of admissions and commitments: (1) voluntary admission, (2) admission on application of proper person with a qualified physician's certificate, (3) commitment of persons other than criminals, and (4) commitment of persons convicted or charged with crime. It is an over-all statute for admission and commitment, with a single set of definitions applicable to all four

70. See *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899); *Laros v. Commonwealth*, 84 Pa. 200 (1877).

71. Judicial reluctance, it may be speculated, had strong roots in basic lack of sympathy for the duly convicted slayer for whom the plea would typically be raised.

72. *Commonwealth ex rel. Smith v. Ashe*, 364 Pa. 93, 115-116, 71 A.2d 107, 118-119 (1950). The court said: "... whether or not mandamus would lie under the Mental Health Act [to compel the warden or jail physician to initiate proceedings to determine whether a prisoner is insane] this Court possesses the power to prevent the execution of an insane person.

"....

"It is a principle imbedded in the common law—and we administer the common law in Pennsylvania—that no insane person can be tried, sentenced, or executed. . . . This court does not accept the view . . . that the Mental Health Act of 1923, as amended in 1937, does not apply to anyone who is imprisoned under sentence of death. Nor do we accept the view of the Commonwealth, as expressed in its brief, 'that relator's remedy is by application to the Governor of Pennsylvania.'"

73. PA. STAT. ANN. tit. 50, §§ 1071-1622 (1954). Referred to hereinafter as the Act.

74. Its title reads: "amending, revising, consolidating, and changing the laws relating thereto."

categories. It should have received interpretation by the courts with recognition of these facts. That this has not been done is an inescapable inference when one considers recent cases to be discussed elsewhere in this paper. The criminal sections were simply designed as one part of a comprehensive method of protecting the sick of mind from themselves and from society, as well as of protecting society from them. The deprivation of liberty resulting from involuntary civil commitment is no less serious than that resulting from criminal commitment. Failure to recognize this has resulted in application of the criminal sections in a manner which has largely destroyed the criminal sections of the Act.

### A.

#### Civil Commitment Procedures.

The first category, voluntary admissions, includes any person thought to be mentally ill, any epileptic over 21 years of age, and any inebriate. A written, signed and witnessed application to the superintendent of the hospital is required, but admission is conditioned upon need for care and the likelihood of the subject's being benefited by admission. "Commitment" by voluntary admission is neither an adjudication nor determination, in terms of other legal proceedings, of the mental status of the individual.<sup>75</sup>

The second civil category is admission on application of a proper person together with a certification by a qualified physician. It is applicable to (a) any person who appears to be mentally ill or in such condition as to need the care required by persons who are mentally ill, (b) resident mental defectives of certain kinds (c) any epileptic twenty-one or over. The application may be made by a relative, guardian, etc., and must state that the patient is a fit subject for care who will be benefited by admission, and the nature of the grounds supporting the action. Two medical certificates are required for one thought to be mentally ill; while one certificate is sufficient for the mental defective or epileptic. These steps having been taken, the superintendent of the institution is empowered to receive and detain the person sought to be admitted as a patient.

The third category is that of a true civil commitment as distinguished from civil "admission." It requires court action and is ap-

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75. *Siegal Estate*, 169 Pa. Super. 425, 82 A.2d 309 (1951) (appointment of guardian for estate); *In re Ryman*, 139 Pa. Super. 212, 11 A.2d 677 (1940) (appointment of guardian for estate); *Herr v. Herr*, 56 D. & C. 421 (North. 1946) (finding of sanity by master in divorce case affirmed); *Smith v. Smith*, 56 D. & C. 279 (C.P. Perry 1946) (proceedings for divorce before master set aside).

plicable to (a) persons who are, or are thought to be mentally ill, (b) epileptics, (c) mental defectives, and (d) inebriates. The court may appoint a sanity commission of two physicians and a lawyer to examine and report whether the patient is mentally ill and a proper subject for commitment, and why. The court may also order a hearing with notice to parties in interest. And the court has power to order a ninety-day maximum commitment just for observation and diagnosis, as well as treatment. The Court may finally order commitment (1) if satisfied by the commission report that there is mental illness and the patient is a proper subject for admission to a mental hospital, (2) if satisfied that the person is a proper subject for care, or that the safety and welfare of the public require commitment.

### B.

#### Criminal Commitment Standards.

The fourth category is concerned with commitment of persons convicted or charged with crime.

The same definition of mental illness is used with respect to all four categories, and wherever else the term appears in the Act. Section 192 of the Act <sup>76</sup> sets out the definition of this term, (as well as other definitions of relevant concepts) as follows:

“(11) ‘Mental illness’ shall mean an illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care. The term shall include ‘insanity,’ ‘unsoundness of mind,’ ‘lunacy,’ ‘mental disease,’ ‘mental disorder’, and all other types of mental cases, but the term shall not include ‘mental deficiency,’ ‘epilepsy,’ ‘inebriety’ or ‘senility’ unless mental illness is superimposed.” <sup>77</sup>

The same section of the Act sets out the definition of mental defective as follows:

“(9) ‘Mental defective’ shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired any self-control, judgment and discretion to manage himself and his affairs, and for whose welfare or that of

76. PA. STAT. ANN. tit. 50, § 1072 (1954).

77. Compare the somewhat similar but somewhat narrower language of the 1923 Mental Health Act: “‘Mental illness,’ ‘mental disease,’ ‘mental disorder’ shall mean an illness which so lessens the capacity of the person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control. The terms shall be construed to include ‘lunacy,’ ‘unsoundness of mind,’ and ‘insanity.’” Act of July 11, 1923, P.L. 414, § 103.



others care is necessary or advisable. The term shall include 'feeble-minded,' 'moron,' 'idiot' and 'imbecile' but shall not include 'mental illness,' 'inebriate' and 'senile.' ”<sup>78</sup>

Either alone or joined as alternatives, these two concepts, “mental illness” and “mental defective,” constitute the standards<sup>79</sup> to be applied at each phase of a criminal proceeding, insofar as commitment under the act is concerned.

### C.

#### Commitment in Stay of Trial.

In part the difficulties that arise in use of the Act stem from inept legislative draftsmanship. Scissors and paste-pot eclecticism, applied to the already patched 1923 Act, could not have been expected to, nor did it produce a model statute.

Section 342 of the act<sup>80</sup> relates to commitment upon arraignment or at trial, or indeed any other time that the defendant is physically before the court up to the time of trial:<sup>81</sup>

“Whenever any person charged with crime, upon production or appearance before the court, appears to be mentally ill or in need of care in a mental hospital, the court shall designate a responsible person to apply for his commitment, or for his commitment with observation, treatment and diagnosis, by order of such court. . . .”

It appears to limit the initiation of action to the court, although suggestion of counsel would probably be heard as a matter of courtesy, if not of right. More serious is the fact that the section is limited in use to those times when the accused happens to be before the court. In addition a clumsy expedient is provided in compelling the court to do by indirection<sup>82</sup> that which it elsewhere has the power, as it should, to do directly. Finally, the section poses as its standard a condition such

78. Compare the language of the 1923 Mental Health Act which is very little different: “‘Mental defective’ shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgment, and discretion to manage himself and his affairs, and for whose own welfare or that of others supervision, guidance, care, or control are necessary or advisable. The term shall be construed to include ‘feeble-minded,’ ‘idiot,’ ‘imbecile.’” *Ibid.*

79. A related concept that may in certain instances act peripherally to the standard is “criminal tendency” which the act defines as “a tendency to repeat offenses against the law or to perpetrate new offenses, as shown by repeated convictions for such offenses or tendency to habitual delinquency.” PA. STAT. ANN. tit. 50, § 1072 (1954).

80. *Id.* at § 1222.

81. While the language of section 342 is broad enough to encompass post-trial situations as well, this is not likely to have been the legislative intent in view of section 343 (commitment of convicted person in lieu of sentence, after report of psychiatrist), section 341 (person acquitted on ground of insanity) and section 344 (person released on bail or detained in penal or correctional institution).

82. Section 342 provides that “the court shall designate a responsible person to apply for (defendant’s) commitment . . . .”

that defendant (a) "appears to be mentally ill," (b) "or in need of care in a mental hospital." This could mean a double, or alternative standard. Or it might simply mean that part (b) was designed to be a parenthetical equivalent of part (a). The matter becomes even more confused when it is recalled that the definition of "mental illness" involves as a subordinate phase the expression "as to make it necessary or advisable for him to be under care." Is this different from "need for care in a mental hospital"? Or, perhaps, the legislature simply meant to stress the "need for care" aspect of the "mental illness" definition as its essential element.

Whatever the legislature may have meant, no more may safely be read into the standard than the term "mental illness"; and, since "need for care" appears both interstitially and as an appendix, that term should receive some stress in applying the standard.

Section 344 of the act<sup>83</sup> is concerned with defendants who are out on bail or in prison or a correctional institution. Again the language used is inept. The relevant portions of the section that should be noted are as follows:

"(a) Petition for the commitment of—

(1) Any person detained in any penal or correctional institution who is thought to be mentally ill or in such condition that he requires care in a mental hospital, or who is thought to be a mental defective.

(2) Any person charged with a crime and released on bail pending trial who is thought to be mentally ill or a mental defective. . . ."

Again a multitude of questions must arise. Is section 344 co-extensive with section 342? Since the bail cases carry a limitation to the period "pending trial" for application of section 344, it is reasonable to assume that the prison cases are subject to the same limitations.<sup>84</sup> But does section 344 extend from arraignment up to and including trial, or does it fill in the gap between arraignment and trial left by section 342? If the two sections overlap, we have needless duplication.<sup>85</sup> If the two are supplementary, we are faced with differing standards and methods for commitment in bar of trial.<sup>86</sup>

83. PA. STAT. ANN. tit. 50, § 1224 (1954).

84. The opposite conclusion can, of course, be defended on the ground that the silence of the legislature respecting the prison and institutional cases was deliberately done for policy reasons.

85. There would be two sections available for arraignment and two for trial, while the period between arraignment and trial would be covered by a single section of the act.

86. At arraignment, and at trial, commitment action could be initiated only by the court and would be available only to the mentally ill. In the interim between arraign-

Furthermore, we have the same problem in section 344 that was posed by section 342 with respect to the meaning to be accorded "mentally ill or in such condition that he requires care in a mental hospital."<sup>87</sup>

In addition, section 344 has established itself in use by defense counsel as a preferred procedural device. The reasons are readily apparent: freedom of action by counsel;<sup>88</sup> arbitrament of a sanity commission;<sup>89</sup> more direct scope of action by the court; and enlarged area of applicability.<sup>90</sup> Granting the legislature sufficient wisdom to know the greater utility of section 344, why was section 342 enacted at all? Simply permitting the court to act not only on petition under section 344, but *ex proprio motu* as well,<sup>91</sup> would have eradicated all reason or argument in favor of having section 342 at all.<sup>92</sup>

#### D.

#### Commitment Upon Acquittal.

Section 341 of the act<sup>93</sup> offers no difficulty. A jury acquittal on the ground of insanity must state the reason in its verdict, and the court may order commitment in accordance with the civil commitment provisions mentioned earlier.

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ment and trial, counsel could initiate action by petition, and commitment would be available for mental defectives as well as the mentally ill. While this seems a wholly absurd distinction, and not one to be credited as legislative intention, it must be remembered that the legislature explicitly made a similar distinction at another place within section 344. Thus it is expressly provided that mental defectives convicted of first degree murder may not apply for commitment.

See opinion by Justice Bell (dissenting in part) in *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955).

87. The problem is, if anything, intensified in section 344. Part (a) (1) uses as a "standard" three factors: (i) mentally ill, (ii) or in such condition that he requires care in a mental hospital, (iii) or who is thought to be a mental defective. Part (a) (2) lists only two factors for the "standard": (i) mentally ill, (ii) or a mental defective.

Did the legislature intend a broader standard for the prison cases of (a) (1) than it established for the bail cases of (a) (2)? Or is the phrase "or in such condition that he requires care" mere surplusage? And is any difference intended between the prison case phrase "thought to be a mental defective" and the bail case phrase "a mental defective"?

88. Counsel may initiate the proceedings simply by petition, and at any time in the pre-trial phase, subject to the limitations of not unduly delaying trial or using the procedure for dilatory purposes.

89. A commission, two of whose members may be assumed to have some knowledge of modern psychiatric thinking, may exert a more powerful effect upon judicial discretion than the voice of the advocate alone.

90. Section 344 applies to both mental defectives and mentally ill persons.

91. And in accord with the court's common-law powers.

92. It might be that section 342 offers the possibility of commitment at trial while a petition under section 344 would be denied if filed on the eve of the trial. The argument ignores the fact that a continuance is still within the court's discretion. It also overlooks not only common-law powers of the court, but the Act of 1860, as well.

93. PA. STAT. ANN. tit. 50, § 1221 (1954).

### E.

#### Commitment in Lieu of Sentence.

Section 343 of the act<sup>94</sup> provides relatively little difficulty.<sup>95</sup> The period between trial and sentence is encompassed in the following provisions:

“(a) Whenever any person is convicted of a crime punishable by sentence to a penal or correctional institution, the trial court may defer sentence and order a mental examination of the defendant to guide it in determining his disposition. . . .

“ . . .

“(c) On the report of the examiner that the defendant is so mentally ill or defective that it is advisable for his welfare or the protection of the community that he be committed to other than a penal or correctional institution, the court may commit him . . . to a state institution for the care of such mental cases in lieu of sentence to a penal or correctional institution.”

Again, however, the legislature has seemingly acted twice where once would do. Section 344(a)(1) is applicable to persons detained in any penal or correctional institutions. Almost all the problems of duality previously discussed with reference to section 344, must therefore be considered anew.

### F.

#### Commitment in Bar of Execution.

Section 344(a) has its sole opportunity to act independently in the phase of proceedings that follows sentence. Enough has been said with respect to the problem of interpreting the standard to be applied in that section that repetition is not warranted.

### V.

#### APPLICATIONS

While adverse criticism of the draftsmanship of the act is not difficult, several things deserve mention on the other side of the ledger.

The general concept behind the Mental Health Act is an excellent one. A comprehensive statute governing admissions and commitments in civil and criminal situations was and is needed. The individual who

94. *Id.* at §1223.

95. But see *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1955), particularly the opinion of Justice Bell, at 38, 39, 40, 117 A.2d at 106, 107 (concurring and dissenting opinion).

must be quarantined for mental treatment cannot be treated differently merely because it has not yet been determined whether he did or did not commit a criminal act in the past. It is not only a barbarous notion to substitute punishment processes for therapy in physical ills, even though the sick man had sinned grievously while well, but it is even less civilized to do so to the sick mind.

We must recognize also that there is more involved in the current status of the Mental Health Act than good intentions frustrated by lack of skilled draftsmanship. For the Pennsylvania Supreme Court, in attempting to apply this legislation, has indicated how difficult it would be to get beyond a seventeenth-century common-law application, no matter how the statute had been framed.

In *Commonwealth v. Patskin*<sup>96</sup> the Supreme Court had an early opportunity to define the term "mental illness." William Patskin was indicted, tried and found guilty of the murder of his wife. The Supreme Court of Pennsylvania affirmed the conviction, and Patskin's application to the State Board of Pardons for commutation of his sentence was denied. Subsequently, counsel for Patskin petitioned for his commitment to a mental hospital in accordance with the provisions of the Mental Health Act. The Commission, consisting of two physicians and an attorney, conducted a physical as well as a psychiatric examination and made laboratory, X-ray and electroencephalographic tests. It filed a report which concluded that Patskin was in fact mentally ill, that he was a schizophrenic of the paranoid type, that his illness was chronic and incurable, that he was dangerous to those about him, and that he was a proper subject for commitment to a hospital. Since the Commission's findings are only advisory upon the court, and since the court was not wholly satisfied with the report made to it, the members of the Commission were directed to appear personally before the court for oral interrogation.

The questions put to the members of the Commission were highly significant. These questions had nothing to do with the issue of mental illness as defined in the Mental Health Act. On the contrary, they were concerned solely with the question of exculpatory insanity as defined by the M'Naghten Rules and adopted by Pennsylvania.

The members of the Commission were asked the following questions:<sup>97</sup>

"(a) Whether William Patskin as of the present date is so insane from disease of the mind as to be unable to distinguish the difference between right and wrong?"

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96. 375 Pa. 368, 100 A.2d 472 (1953).

97. *Id.* at 373, 100 A.2d at 474.

- (b) Whether William Patskin as of the present date is so insane from disease of the mind as to be unable to understand the nature and quality of his acts and to distinguish between right and wrong with respect to them?"

The majority opinion by the lower court found that Patskin was then, and had at all times been legally sane; that he possessed sufficient mental ability to distinguish between right and wrong; that he knew why he was in jail, and that he knew he was under sentence of death for the killing of his wife. This majority opinion also found that Patskin had sufficient mental ability to communicate with counsel and others; that his alleged delusions were faked; and that the court was not convinced or satisfied that the defendant was presently mentally ill as defined in the Mental Health Act.

The findings indicate quite clearly that the lower court was thinking in terms of the M'Naghten formula and not in terms of the Mental Health Act. The Supreme Court of Pennsylvania did something more than merely ignore the terms of reference utilized by the lower court. In quoting the findings of the Sanity Commission, and then going on to quote the questions addressed to that Commission, and finally, in setting out the findings of the lower court majority in detail—even going so far as to deliberately summarize that, "There was ample justification for the findings and conclusions of the lower court, and we find no abuse of discretion or error of law,"—the Supreme Court of Pennsylvania, in effect, approved the interpretation of the Mental Health Act utilized by the majority of the lower court. That approval is not simply an inference from the fact that the Supreme Court of Pennsylvania affirmed the order of the lower court. It is the only meaningful interpretation to be given to the opinion of the Supreme Court in view of the language utilized by the Supreme Court, and in view of the language of the Sanity Commission and lower court, deliberated upon and reviewed by the Supreme Court.

Almost exactly two years later, the Supreme Court of Pennsylvania had occasion to review this concept of mental illness in terms of the Mental Health Act once again. The question arose in *Commonwealth v. Moon*.<sup>98</sup> The opinion in the *Moon* case (*i.e.*, the first *Moon* case, to be distinguished from a second phase of this case which reviewed another aspect of the problem) set out the standard to be applied. The court announced that the legislature had provided a definition of mental illness in section 192 of the act, and that this definition, rather than the M'Naghten formula, governed criminal commitment.

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98. 383 Pa. 18, 117 A.2d 96 (1955).

The majority<sup>99</sup> did not voice any of the difficulties that have been suggested in this paper with respect to the meaning to be accorded the use of the definition. The majority opinion stated that:

" . . . [The] controlling factor is the degree or extent to which the mind is affected by the mental disorder and not the bare existence of symptoms which would induce a psychiatrist to diagnose a mental illness."<sup>100</sup>

This was a clear break with the common-law standard of total madness, at least in theory. Mental illness had to have these characteristics to qualify the accused for commitment under the act:

" . . . [A]n illness which so lessens the capacity of a person to use his customary self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under care."<sup>101</sup>

It soon became clear, however, that in practice, little if anything short of the total madness concept of the common law would satisfy the lower courts. In 1956 the Supreme Court of Pennsylvania disposed of a series of cases concerned with the problem of criminal commitment on grounds of present mental illness. These cases were *Bechtel*,<sup>102</sup> *Novak*,<sup>103</sup> *Gossard*,<sup>104</sup> *Ballem*,<sup>105</sup> and the second *Moon* case.<sup>106</sup> Each in its turn indicated that the Supreme Court is extremely reluctant to disturb the conclusions of the lower courts, no matter how striking the evidence of mental illness, so long as the lower court uses the language of the act in expressing its conclusions.<sup>107</sup>

99. Justice Bell, however, in his concurring and dissenting opinion did point out that "some provisions thereof are uncertain or confusing or inconsistent or conflicting." *Id.* at 39, 117 A.2d 107. See also notes 86 and 95 *supra*.

100. *Id.* at 28, 117 A.2d at 102.

101. *Id.* at 27, 117 A.2d at 101. The legislative language was as open to serious questions as other sections of the act. Was congenital mental illness to be excluded because there was no "customary" base of self control, etc. which the disease could be said to have "lessened"? Were children (who might be brought to trial for murder, despite the laws relating to juvenile delinquency) to be excluded because no "customary" level had been "lessened" since birth, even though there was serious mental illness? Was need or advisability of "care" the paramount concept or were "self control, judgment and discretion" to be given greater weight?

These faults of the definition are not attributable to the court, of course. By the same token, no attempt to meet or dispose of these faults within the language of the act may be attributed to the majority of the court.

102. *Commonwealth v. Bechtel*, 384 Pa. 184, 120 A.2d 295 (1956).

103. *Commonwealth v. Novak*, 384 Pa. 237, 120 A.2d 543 (1956).

104. *Commonwealth v. Gossard*, 385 Pa. 312, 123 A.2d 258 (1956).

105. *Commonwealth v. Ballem*, 386 Pa. 20, 123 A.2d 728 (1956).

106. *Commonwealth v. Moon*, 386 Pa. 205, 125 A.2d 594 (1956).

107. "While the appointment of a commission is not mandatory, a Court has no right to arbitrarily or capriciously refuse to appoint a commission; or, if a commission

The lower courts show an alarming tendency to ignore the findings of the very commissions they impanel to advise the court. Nor does the safeguard of having two medical experts, often distinguished psychiatrists, on these commissions seem to influence either the lower courts or the Supreme Court in passing upon the exercise of judicial discretion below. So little regard is paid to the findings of experts<sup>108</sup> that one wonders why the courts bother to set the commissions in action at all.<sup>109</sup>

It is disturbing that the Pennsylvania courts in relying upon "positive facts,"<sup>110</sup> in disregard of the findings of sanity commissions, are becoming practitioners of amateur psychiatry. A lifetime on the bench observing witnesses may make a judge expert in determining the credibility of persons sound in mind.<sup>111</sup> But in the determination of mental illness or degrees of mental health, where experts agree and the court disagrees, the only "positive fact" would seem to be that the courts are practicing medicine without a license and without training.<sup>112</sup>

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is appointed, it has no right to arbitrarily or capriciously reject the findings or conclusions of the commission. However, it is well to recall that 'If a commission is appointed, its findings are advisory and not mandatory upon the Court—under the Act (of 1951) it is the Court and not the psychiatrist or the Sanity Commission which must be satisfied that the petitioner is insane or mentally ill. . . . Upon appeal we should reverse a lower court for an abuse of discretion or an error of law.'" *Commonwealth v. Ballem*, 386 Pa. 20, 31, 123 A.2d 728, 734 (1956), citing *Commonwealth v. Moon*, 383 Pa. 18, 117 A.2d 96 (1956); *Commonwealth v. Patskin*, 375 Pa. 368, 100 A.2d 572 (1953). See *Commonwealth v. Gossard*, 385 Pa. 312, 123 A.2d 258 (1956).

108. The worth of psychiatric testimony in Pennsylvania, so far as the courts seem to be concerned, is probably at an all-time low that is not equalled or rivaled elsewhere here or abroad. The cases have repeatedly stated: (1) "You do not have to be a psychiatrist to judge whether a man's actions are normal or abnormal." *Commonwealth v. Moon*, 386 Pa. 205, 213, 125 A.2d 594, 598 (1956), quoting from *Commonwealth v. Carlucci*, 369 Pa. 190, 85 A.2d 391 (1952); *Commonwealth v. Cilione*, 293 Pa. 208, 142 Atl. 216 (1922). (2) ". . . testimony of laymen as well as experts is admissible in determining the mental status of a criminal defendant." *Commonwealth v. Moon*, 386 Pa. 205, 212, 125 A.2d 594, 598 (1956), citing *Commonwealth v. Patskin*, 375 Pa. 368, 100 A.2d 472 (1953); *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899); and others. (3) ". . . expert testimony is entitled to little weight as against positive facts." *Commonwealth v. Gossard*, 385 Pa. 312, 321, 123 A.2d 258, 262 (1956), citing *Commonwealth v. Patskin*, 375 Pa. 368, 100 A.2d 472 (1953); *Commonwealth v. Wireback*, 190 Pa. 138, 42 Atl. 542 (1899).

109. One wonders whether the same judges would as willingly rely on their own appraisal of "positive facts" and be so ready to discount the advice or disregard the opinions of medical experts or psychiatrists if the mental health of members of their own families were in question.

110. See note 107 *supra*.

111. In *Commonwealth v. Gossard*, 385 Pa. 312, 327-328, 123 A.2d 258, 265 (1956), the lower court opinion was quoted by the Supreme Court with high approval as follows: "The majority of the Judges of this court have had many years of experience in the trial of thousands of civil, criminal and juvenile proceedings. Innumerable parties and witnesses have appeared before this court. Their demeanor has been observed, the credibility of their testimony has been evaluated—an enormous cross-section of humanity."

112. The courts are in a dilemma that results from trying to live up to so high a level of responsibility that they undertake tasks beyond their professional competence.



More disturbing is the conclusion that we are in the process of taking the long step backward to a common-law concept of "total madness" as a standard while adhering to the form of "mental illness" as our test. The second *Moon* case is the latest and best example of the process.

The sanity commission in that case found that Moon was mentally ill, the illness being dementia praecox of the paranoid type, chronic in character, and rendering Moon a proper subject for commitment to a mental hospital. The commission also found that Moon

"knew why he was in jail . . . knew that he faced a sentence in accordance with the jury verdict . . . knows that he is on trial for his life . . . recalls his trial . . . admits that no one is justified in taking anyone's life . . . knows that it is not right to shoot anybody . . . and what the consequences of his acts might be. . . ."

As facts that influenced the court, these items are relevant only with respect to two situations, neither of which was before the court: the first four items show exercise of reason,<sup>113</sup> which was the 1888 standard employed in the *Webber* case; the last three items apply only to an exculpatory M'Naghten test. Since exculpation was not in issue, it would appear that the court in practice was using the common-law standard rather than that of the Mental Health Act of 1951 to determine the issue of present state of mind.

Of course there was other evidence upon which the court relied in disregarding the findings of its own commission with ultimate approval of the Supreme Court.<sup>114</sup> All of the items which were testified to by the prison warden, the prison doctor, the three guards who had been in continuous charge of Moon, and several other guards, indicated that Moon lived the life of the other prisoners and behaved as they did.<sup>115</sup>

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The dilemma is that the courts cannot abandon the functions of the tribunal to the psychiatrist and, on the other hand, cannot exercise the skills of the psychiatrist when the tribunal is concerned with mental health.

The judicial fear of the psychiatrist was implied in *Gossard, supra* note 110 at 327, 123 A.2d at 265 when the court said, "Psychiatry has its place in our health economy. The danger arises from an attempt to explain every human action by a formula of conduct which may or may not apply." The same court, however, would not be disturbed at turning over to an engineer the decision as to soundness or degree of soundness of a bridge, or to a cardiologist the problem of degree of soundness of the heart, if these things became issues in court or called for advice to the judiciary so that it might exercise its powers of discretion.

113. Compare these items with those set out in note 37 *supra*.

114. Justice Musmanno dissented vigorously, however.

115. Moon "... played games in the exercise yard ... obtained books and magazines from the library ... corresponded with his family ... was visited ... by various members of his family ... [and at his request] by the prison chaplain ...

But the same thing might also be said of most of the inmates of the mental hospitals of the world. They too read magazines and books, shave, exercise, write letters and altogether do not behave as though completely bereft of reason.

More significantly, these factors, stressed by the court and relied upon as positive facts sufficient to permit a court to override expert opinion by experts of its own choosing, are the very factors upon which reliance was placed at common law when the required standard for present insanity was total madness.

Furthermore, if guards and wardens (and a prison doctor who testified to state of physical health) are to be relied upon as skilled observers, we have the further anomaly that when courts practice psychiatry they do so at second hand. Even when courts rely upon direct observation of the prisoner at the bar, neither the time nor the place is conducive to sound examination. Consequently the only diagnosis that the judge, in his role of untrained psychiatrist, can make is the all-or-none diagnosis of total madness, or lack of it. But in his more familiar role of judge, he will inevitably find the weight of his dual responsibility so heavy that he will rarely be able to complete the diagnosis with sufficient certainty to decide that the abnormal condition exists.

A highly conscientious judge will find the burden that much heavier. Hence, a diagnosis of mental illness will rarely be reached, no matter how extreme the case presented may be. How else can the *Moon* case be explained? Prison can hardly have achieved a magic cure of Moon; paranoid schizophrenics are rarely cured even under ideal conditions of therapy. It is a disease that has been called cancer of the mind. It was diagnosed as presently existing, by a skilled commission containing experts, in the case of Moon who killed a judge in open court before witnesses. Who but judges laboring under an impossible dual burden could have concluded that Moon was not mentally ill under those circumstances?

In light of all this it is time for a new Mental Health Act, carefully drafted, with unambiguous standards, and above all with the roles of the participants, particularly the judges, so defined that each perform the function for which his office and training equip him, and no other.

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his conversation and all his actions [observed by guards] were normal and [the guards] noted no unusual or abnormal conduct . . . [he] subscribed to two magazines, 'The Argosy' and 'Hunting and Fishing' . . . read 'Life' and 'Time' . . . shaved regularly . . . didn't smoke . . . [and] nothing unusual was noted in any of [his] letters and no items were included which had to be stricken out. . . ." *Commonwealth v. Moon*, 386 Pa. 205, 209-210, 125 A.2d 594, 596-597 (1956).